

IN THE MATTER OF BRICKWORKS LIMITED (No. 1)

An application under sections 657A and 657D of the Corporations Law by GPG (No. 4) Pty Limited for a declaration and orders in relation to a takeover bid by GPG for all of the ordinary shares in Brickworks Limited.

REASONS FOR DECISION

1. The Panel in this matter is made up of Les Taylor (sitting President), Marian Micalizzi (sitting Deputy President) and Louise McBride.
2. On 24 August 2000 we declined an application by GPG (No.4) Pty Limited (*GPG*) to make declarations and orders under sections 657A and 657D of the Corporations Law¹ in relation to the affairs of Brickworks Limited (*Brickworks*) and Washington H Soul Pattinson & Company Limited (*Soul Pattinson*)². These are our reasons for that decision.

INTRODUCTION

3. The matter relates to a takeover bid made by GPG on 2 May 2000 for all of the ordinary shares in Brickworks.
4. GPG's application concerns an announcement (the *Announcement*) made on 25 May 2000 to the Australian Stock Exchange (*ASX*) by Soul Pattinson headed "Announcement by Independent Directors" and signed by David Fairfull, Graeme Robertson and Peter Robinson (the *Directors*).³
5. The Directors stated that Soul Pattinson had considered GPG's offer and would not be accepting it. They also said that "the GPG offer undervalues Soul Pattinson's investment in Brickworks" and that they had obtained advice from KPMG Corporate Finance (Australia) Pty Limited (*KPMG*) to the same effect.
6. GPG sought declarations that, due to the Announcement, circumstances in relation to the affairs of Brickworks and Soul Pattinson were unacceptable having regard to their effect on the control or potential control of those

¹ Statutory references are to the Corporations Law, as in force in August 2000.

² Findings of fact in these reasons are based on the bidder's and target's statements, GPG's application and parties' submissions and on the annual reports for 1998-1999 of Brickworks and Soul Pattinson.

³ The Announcement was headed "Announcement by Independent Directors" and the words "Independent Director" were printed under the name of each of the directors. Graeme Robertson and David Fairfull are both non-executive directors. Peter Robinson, however, is the Group General Manager and Chief Executive Officer of Soul Pattinson.

companies. It also sought an order that Soul Pattinson disclose to the market a valuation report in relation to Brickworks obtained by it from KPMG.

7. One of the Panel's functions is to determine whether unacceptable circumstances exist in relation to a bid and, if they do, to take action by way of declaration and orders to remove those unacceptable circumstances (subsections 657A(1) and 657D(1) and (2)). Section 657A sets out the matters which must be taken into account in determining whether the Panel may declare that circumstances are unacceptable.

BACKGROUND

The parties

8. The parties are GPG, Brickworks, Soul Pattinson and the Australian Securities and Investments Commission (*ASIC*).
9. GPG is a wholly owned subsidiary of Guinness Peat Group plc (*GPG plc*), a company incorporated in England and listed on the London, New Zealand and Australian Stock Exchanges. GPG currently owns approximately 10.14% of the issued ordinary shares in Brickworks.
10. Soul Pattinson and Brickworks are both listed public companies whose shares are traded on ASX. Soul Pattinson is a diversified company which derives most of its profit from its investments, which include property and manufacturing assets, retail pharmacy operations and media interests.
11. The principal activities of Brickworks are the manufacture of clay products (Austral Bricks) and investment.
12. Soul Pattinson holds approximately 49.84% of the issued shares in Brickworks, which holds approximately 42.85% of the issued shares in Soul Pattinson. Robert Millner is the Chairman of both companies and Michael Millner is a director of both companies. Each of them has a relevant interest in approximately 2% of the shares in Brickworks and approximately 6.5% of the shares in Soul Pattinson.⁴

The bid

⁴ Target's statement. The total number of shares in which they have interests is less than 4% and 13%, respectively, as their relevant interests largely overlap.

13. On 6 April 2000, GPG announced its intention to make a takeover offer for Brickworks. On 12 April 2000, the directors of Brickworks advised the company's shareholders not to take any action until the directors had considered the bid and made a recommendation.
14. GPG lodged and served a bidder's statement for an off-market takeover bid for all of the ordinary shares in Brickworks on 18 April 2000. On 2 May 2000, GPG dispatched its bidder's statement and offers. The following day, the board of Brickworks again recommended that its shareholders not take any action in relation to the bid. Brickworks' target's statement was dispatched on 17 May 2000.

Terms of the bid

15. GPG is offering 4 shares in Soul Pattinson plus \$100 cash for every 5 ordinary shares in Brickworks. The bid was initially open until 21 June 2000. It has since been extended to 21 September 2000.
16. The bid is subject to a number of conditions including:
 - (a) that GPG receives sufficient acceptances to entitle it to proceed to compulsory acquisition;
 - (b) that the shareholders of GPG plc approve the acquisition of Brickworks shares as contemplated by the offer; and
 - (c) Foreign Investment Review Board approval.
17. The bid is intended to break up the cross-shareholdings between Soul Pattinson and Brickworks.
18. It is conditional on GPG receiving sufficient acceptances, importantly, including Soul Pattinson's shares in Brickworks, to proceed to compulsory acquisition. This will enable GPG to procure Brickworks to sell to GPG its shares in Soul Pattinson, at market value, to distribute as part of the bid consideration.
19. As GPG does not hold sufficient Soul Pattinson shares to perform the bid contracts, it proposes to buy shares in Soul Pattinson from Brickworks at the conclusion of the bid, at market value.
20. For a number of reasons, GPG needs Soul Pattinson to accept its offer for its shares in Brickworks or sell them to people who accept the offer. The

bid is intended to break up the cross-shareholdings between Soul Pattinson and Brickworks. It is conditional on GPG receiving sufficient acceptances to proceed to compulsory acquisition. GPG will be unable to procure Brickworks to sell to GPG its shares in Soul Pattinson unless it obtains control of Brickworks.

21. It is common ground that GPG's bid must fail, unless Soul Pattinson accepts the bid for its shares in Brickworks or sells its shares in Brickworks to persons who accept the bid.
22. Under sections 259A and 259B neither Soul Pattinson nor a subsidiary could simply accept an offer to enter into a contract under which it would receive shares in Soul Pattinson itself. The consequences of that fact have been debated between the parties, but did not affect these proceedings.

The Announcement

23. On 25 May 2000, the Directors made the announcement which is the subject of GPG's application. It included the following (emphasis added):

*"It has been concluded that Soul Pattinson will not accept **the GPG offer which is highly conditional and undervalues Soul Pattinson's investment in Brickworks.** In assisting Soul Pattinson in making this decision, the independent directors retained KPMG Corporate Finance (Aust) Pty Limited, who concluded that **the GPG offer undervalues Soul Pattinson's investment in Brickworks.** Legal advice was also taken by the independent directors of Soul Pattinson in relation to GPG's offer.*

...

Soul Pattinson recognises that unless it accepts the GPG offer for its Brickworks shares or alternatively disposes of its Brickworks shares before the end of the offer period to persons who then accept the GPG offer, GPG's minimum acceptance condition will not be met and the current offer will not succeed."

24. GPG wrote to Soul Pattinson on 5 June 2000, requesting that it release to the ASX the "valuation report from KPMG Corporate Finance" referred to in the Announcement. Soul Pattinson declined on 13 July 2000.

GPG's APPLICATION

25. On 3 August 2000 GPG lodged an application (the **Application**) seeking:
- (a) a declaration that circumstances in relation to the affairs of Brickworks were unacceptable;
 - (b) a declaration that circumstances in relation to the affairs of Soul Pattinson were unacceptable; and
 - (c) an order that Soul Pattinson be required to disclose to the market the KPMG Advice.⁵

PROCEEDINGS

26. The Application was served on Brickworks, Soul Pattinson and ASIC, each of which became a party by lodging a notice of appearance. In accordance with regulation 20 of the *Australian Securities & Investments Commission Regulations 1990* the Panel decided, on 9 August 2000, to conduct proceedings in relation to the Application. The Panel prepared a brief setting out a summary of the grounds presented in the Application and a general description of the matters to be examined in the proceedings. The brief also invited the parties to make submissions on a number of matters, including:
- (a) whether releasing the particular content of the Announcement in the particular circumstances of GPG's bid for Brickworks attracted an obligation to release KPMG's advice, or led to unacceptable circumstances because the report was not released, and if so why;
 - (b) whether any rule of law or general policy applies to the Directors and has the effect that if they make a public statement about a takeover bid, they may only refer to a valuation report concerning the target (or to the value of the assets of the target) if they also publish that report (or a valuation report concerning those assets); and
 - (c) whether the Application was made after the time allowed by paragraph 657C(3)(a) and, if so, whether the Panel should determine a longer period under paragraph 657C(3)(b)

JURISDICTION

⁵ Although the Application refers to a "valuation report", submissions received from Soul Pattinson establish that KPMG's advice to Soul Pattinson (the **KPMG Advice**) did not include a valuation of Brickworks shares or the bid consideration.

27. The GPG bid for Brickworks was on foot at all relevant times. Its completion would lead to the transfer of substantial parcels of shares in both Brickworks and Soul Pattinson. Information relevant to a decision whether to accept that bid could affect the outcome of the bid, control of both companies, the acquisition of substantial holdings in each company and the existence of an efficient, competitive and informed market in their shares. Material misinformation would quite adversely affect those outcomes. Accordingly, we were satisfied that GPG's application raised issues which the Panel could and should consider.

Whether the Application was out of time

28. The Announcement was made on 25 May and the application was made on 3 August, over two months later. Soul Pattinson submitted that, without an extension of time, the application was made after the time allowed by subsection 657C(3).
29. Under subsection 657C(3), an application must be made "within 2 months after the [relevant] circumstances have occurred" or within a longer period determined by the Panel. Under section 657B, a declaration can only be made "within 3 months after the [relevant] circumstances have occurred", unless that time is extended.
30. A circumstance is distinct from the act or event which brings it into existence: circumstances are the relatively persistent background against which acts and events occur.
31. The relevant circumstance is the effect on offerees and the market of the Announcement. It commenced when the Announcement was made and still existed at the date of our decision. In our view, the relevant circumstance had not ceased to occur and the two month limitation period had yet to commence when the application was made.
32. However, had we taken the view that the relevant occurrence was the making of the Announcement, we would extend time to bring the application for two reasons:
- (a) the state of affairs to which the Announcement gave rise still existed throughout the proceedings, not greatly affected by the passage of time or by subsequent events; and
 - (b) even on that view, we dealt with the matter within the overall limit of 3 months set by paragraph 657B(a).

Whether Circumstances Affect Control

33. Soul Pattinson also submitted that the Panel lacks jurisdiction to make the declaration sought by GPG, because the alleged unacceptable circumstances did not have any effect on the control or potential control of Brickworks, or on an acquisition or proposed acquisition of a substantial interest in Brickworks. They submit that the relevant circumstances did not affect control of either company or the proposed acquisition, because of the decision of Soul Pattinson not to accept the bid. As stated, this submission appears to misconstrue paragraph 657A(2)(a) and ignore paragraph 657A(2)(b). We did not need to decide this issue.

CIRCUMSTANCES ALLEGED TO BE UNACCEPTABLE

34. With one exception, GPG did not allege that in making the Announcement the Directors contravened, or avoided complying with, any provision of the Corporations Law. The exception is that GPG submit that the announcement was misleading, implying that it contravened section 995. That issue is discussed below at paragraph 48.
35. If publication of the Announcement led to unacceptable circumstances in relation to the affairs of Brickworks, Soul Pattinson or both, it must be because it tended to frustrate the policies set out in paragraphs 602(a) and (b):
- “(a) the acquisition of control over ... the voting shares in a listed company ... takes place in an efficient, competitive and informed market; and
 - (b) the holders of the shares ... are given enough information to enable them to assess the merits of [a proposal to acquire a substantial interest in the company].”
36. GPG submitted that:
- (a) the statement that “the GPG offer undervalues Soul Pattinson’s investment in Brickworks” implied a conclusion as to the respective values of the offer consideration and of Brickworks’ shares;
 - (b) a valuation of that kind is particularly liable to be misleading, unless the data and methods used to derive it are set out;⁶
 - (c) the Announcement was not supported by any such data, only by the authority of the Directors and of KPMG Corporate Finance;

⁶ Application, page 5.

- (d) KPMG had given the Directors advice on which the Announcement partly relied;
- (e) that advice must have included a valuation based on asset values and earnings;⁷
- (f) the information in the market about the value and earnings of Brickworks (and specifically about the financial performance of the cross-holdings with Soul Pattinson) is inadequate;
- (g) the Directors appear to have access to information about Brickworks which has not been made available to other shareholders in Soul Pattinson and Brickworks;⁸
- (h) Soul Pattinson is well known to have been a substantial shareholder in Brickworks for a very long time;
- (i) because the Announcement was made by Soul Pattinson, and mentioned the KPMG Advice, it had an authority which was not matched by its content;⁹ and
- (j) accordingly, the valuation report provided by KPMG to the Directors should be released.

The Terms of the Announcement

37. We are concerned at the repeated use in the Announcement of the expression “the GPG offer undervalues Soul Pattinson’s investment in Brickworks”. These words were quoted from the conclusion of the KPMG Advice. GPG takes them to mean that the Directors, having obtained a valuation of each, were offering advice to the effect that Brickworks shares were worth more than the bid consideration. That reading is clearly open.
38. We have been advised by the Directors and by KPMG, however, that KPMG did not provide a valuation of either Brickworks or the bid consideration (effectively, shares in Soul Pattinson). Rather, KPMG were asked to advise whether, on the basis of published information, having regard to Soul Pattinson’s investment objectives and criteria and the performance of its investments in Brickworks and in other companies, it was preferable from Soul Pattinson’s standpoint to retain its Brickworks shares or to accept the bid.

⁷ Application, page 4.

⁸ Paragraph 3 of letter dated 5 June 2000 from GPG to Soul Pattinson, appended to the Application.

⁹ Application page 3 “Soul Pattinson has power to significantly influence the market’s perception as to the value of Brickworks shares” and page 4 “The Independent Directors named KPMG as the author of the report for the purpose of giving authority and credibility to the conclusion on which they relied and [giving authority and credibility] in turn to the decision of Soul Pattinson not to accept the offer”.

39. We have been assured by the Directors and by KPMG that the reference to undervalue (in the Announcement and in the KPMG Advice, respectively) was intended to convey only that it was preferable from Soul Pattinson's standpoint to retain its Brickworks shares than to accept the bid. The Announcement referred to the KPMG Advice to establish that the Directors had followed a proper process and was not intended as advice to other investors that the bid consideration was insufficient. We dealt with this in our announcement of our decision.

The inadequacy of other information about Brickworks

40. GPG did not develop its submission that the information in the market about Brickworks and about the cross-shareholding between Brickworks and Soul Pattinson is inadequate. The accounts of each company record the cross-holdings and each equity accounts the other. GPG criticised the financial reporting of both companies, but made no detailed challenge to the adequacy of the accounts. It did not suggest, for instance, that the accounts fail to comply with Australian accounting standards.
41. To a degree, in preparing their respective statements, GPG must and Brickworks itself may rely on information provided to the market by Brickworks and by Soul Pattinson.¹⁰ It is fair to observe, however, that in neither GPG's own bidder's statement nor Brickworks' target's statement is there any attempt to value shares in Brickworks or in Soul Pattinson or to assess the effect on the share price of Soul Pattinson of dispersing Brickworks' holding in Soul Pattinson.

Whether there is a need to publish the KPMG Advice

42. Under sections 37 and 38 of the previous *Companies (Acquisition of Shares) Code* and under the *London City Code*, approval is needed for a target company or its associate to publish a statement about the value of the target's assets or about its profits. In effect, the statement needs to be based on published accounts or an expert report.
43. Similarly, sub-sections 22(3) and 32(3) the *Companies (Acquisition of Shares) Code* and recently repealed subsections 647(3) and 683(3) of the Corporations Law prohibited a Part B or Part D statement (what is now a target's statement) from referring to an expert's report, unless the report was included with the statement. These rules are intended to prevent

¹⁰ Subsection 636(1), last sentence, and subsections 638(1) and (2).

offeree shareholders being beguiled by information which appears to be authoritative, but without any means of assessing whether it is reliable.¹¹

44. None of those rules now applies in Australia. Apart from the positive disclosure obligations imposed on bidders and targets by Chapter 6 and the Listing Rules, disclosure is regulated by section 995, which prohibits misleading and deceptive conduct. If Brickworks itself had made the Announcement, the Corporations Law would not have directly required it to publish the KPMG Advice.
45. Since the Announcement did not attract any provision positively requiring the publication of supporting advice, the only statutory requirement to publish that advice would have been indirect: to prevent the Announcement being misleading or deceptive.

WERE THERE UNACCEPTABLE CIRCUMSTANCES?

46. The relevant criteria of unacceptability are whether the Announcement tended to frustrate the policy of Chapter 6 which, in its application to these facts, requires that:
 - (a) GPG's bid for Brickworks take place in an efficient, competitive and informed market; and
 - (b) holders of Brickworks shares be given enough information to enable them to assess the merits of the bid.
47. If the Announcement was misleading or deceptive, its publication would have detracted from the adequacy of the information available in the market and to offeree shareholders. Whether misinformation gives rise to unacceptable circumstances is a matter of degree, and depends on the materiality of the misinformation.

Misinformation about Value?

48. GPG submitted that, in the absence of supporting detail, there is a risk that a statement from an authoritative source comparing the value of the bid consideration to that of the target company's shares will mislead the market and shareholders about the respective values. As a general proposition, that has some force.
49. GPG also submitted that the statement in the Announcement that the KPMG Advice concludes that GPG's offer undervalues Soul Pattinson's

¹¹ *In the matter of Evans Deakin Industries Limited* (1980) ACLC 40-666.

investment in Brickworks was actually (and not merely potentially) misleading, without disclosure of the assumptions and standards used by KPMG. This had some force, particularly if the Announcement was to be understood as implying that those assumptions and standards were applicable to offeree shareholders.

50. Those considerations ceased to apply, however, when the Directors and KPMG assured us (see paragraph 54 below) that the Announcement did not express advice as to the value of either the bid consideration or Brickworks shares, but was specific to Soul Pattinson's situation (i.e that KPMG had used Soul Pattinson's assumptions and standards).

Misinformation about the existence of a Valuation?

51. This process also established, however, that the Announcement had been open to misunderstanding on a separate issue, namely because it implied that KPMG had provided the Directors with a valuation of the bid consideration, of Brickworks shares or both.
52. Until the issue of our clarificatory statement (ie between 25 May and 24 August), there may have been some risk of the Announcement being misunderstood in this way. It is unlikely, however, that any such misunderstanding caused material mischief. Its tendency is more likely to discourage shareholders from accepting the bid. Soul Pattinson's decision not to accept the bid, communicated as it was in the same Announcement, gave other Brickworks shareholders a better reason not to accept. Accordingly, having regard to all the circumstances, we are not able to conclude that this defect of the Announcement is such as to give rise to unacceptable circumstances.

Abuse of Position

53. GPG invited us to approach the matter on an alternative basis, in effect that the Directors had abused their position to influence the market's appraisal of the bid. We agree that the Directors were in a position to affect the market's perception of the value of Brickworks shares. Coming from someone with no connection with Brickworks, any such Announcement would not have had the same power to influence shareholders. In the end, however, we are of the view that the Announcement is unlikely to have misled offerees.
54. Similarly, we investigated GPG's allegation that the Announcement had the effect of conveying to the market conclusions based on price-sensitive

information derived from Brickworks and not available to the market. Soul Pattinson gave us unequivocal assurances that KPMG had used no private information from Brickworks, and KPMG provided to us a statutory declaration to the same effect. We dealt with this issue in our announcement of our decision.

CONCLUSION and ORDERS

55. As mentioned above, we concluded that the Announcement had the potential to be misunderstood, as it might have been taken to imply that KPMG had valued Brickworks shares and the bid consideration (effectively, Soul Pattinson shares).
56. If the decisions of Brickworks shareholders to hold, accept or sell on market would have been affected by that possible misinformation, it might have given rise to unacceptable circumstances. Given the particular facts of the matter, however, we are satisfied that the mention of undervalue in the Announcement would not have materially affected those decisions. The difference is one of degree: while the Announcement requires clarification, it would be excessive to declare that it had given rise to unacceptable circumstances in relation to the bid.
57. To obviate the risk of misunderstandings in the future, we decided that a clarifying announcement should be made. We invited Soul Pattinson to make a further announcement conveying to the market the same explanations as it had given to us. Soul Pattinson declined to make any announcement before the Panel published its position. Accordingly, we included those explanations in our announcement of our decision, dealing with the basis of the KPMG Advice and the sources of information used by KPMG. A copy of that announcement is appended to these reasons.
58. Accordingly, we decline to make the declarations and orders sought.
59. There will be no order for costs. We thank all parties for their submissions and evidence.

Les Taylor
6 October 2000